Brianna L. Schofield · Robert Kirk Walker

FAIR USE FOR NONFICTION AUTHORS

Common Scenarios with Guidance from Community Practice

Authors Alliance · No. 3

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FAIR USE
FOR NONFICTION AUTHORS

Common Scenarios with Guidance from Community Practice

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A note for members of international organizations: While similar limitations exist in other countries, the information in this guide applies only to fair use under United States law.

AUTHORS ALLIANCE

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I. INTRODUCTION

Nonfiction authors often use existing materials in their works: A historian excerpts a soldier's letters to a loved one; an art critic reproduces a telling detail in a painting; a scientist quotes from a well-known article. Readers of nonfiction works expect new writing to reference and incorporate other works; indeed, the quality and integrity of nonfiction works frequently depend on the author's skillful use of such materials. Although drawing from other works is common, it can often seem difficult to know when (and how much) unlicensed copying is permissible and whether certain unlicensed uses of another's work put you at risk of copyright infringement.[1]

Sometimes, authors need to seek permission or pay for a license to use copyrighted materials. An author may even need a license to use her own works

because she signed over her copyrights to her publisher. But not always. In some situations, unlicensed use may be legally permitted by virtue of the "fair use" doctrine, a well-known (but oft-misunderstood) limitation to copyright in the United States.[2] Fair use is a powerful tool, but unfortunately many nonfiction authors find it tricky to know when to rely on fair use and when to seek permission. That's where this guide comes in.

In addition to providing background information on copyright law and fair use, this guide identifies three common situations that nonfiction authors encounter when incorporating existing materials into their works and then discusses general fair use principles and limitations that apply in these situations. This guidance is based on broadly shared norms found in the leading fair use statements of best practices, as well as existing case law.[3] We hope this guide will help demystify fair use for nonfiction authors.[4]

WHO IS THIS GUIDE FOR?

Are you a nonfiction author? Have you ever wanted to know whether you needed permission or a paid license to use

copyrighted material in your work? Would you like to learn more about fair use?

If you answered yes to these questions, then read on! This guide is designed for all nonfiction authors—from biographers to science writers, historians to literary critics, memoirists to academics, and beyond—who want to know more about using copyrighted materials. This guide will help nonfiction authors who want to do things like:

- Include song lyrics in an academic paper discussing musical trends;
- Quote from a novel to analyze the author's use of metaphors in a work of literary criticism;
- Incorporate a photograph in an article about the photographer's use of light and shadow;
- Use a chart in a scientific paper critiquing a researcher's methodology and findings; or
- Quote from unpublished letters in a memoir.

HOW WAS THIS GUIDE CREATED?

This guide was prepared by the *Authors Alliance*, a nonprofit organization that provides educational materials and advocates for the interests of authors

who want to share their creations broadly in order to serve the public good. To further this mission, *Authors Alliance* created this guide to help nonfiction authors understand reasonable strategies for the application of fair use in common situations that nonfiction authors encounter. In this way, *Authors Alliance* hopes to help nonfiction authors to create their best possible works, distribute those works widely and, in turn, enhance the public's access to knowledge and culture.

This guide is based on the common situations in which nonfiction authors incorporate copyrighted materials into their works. In order to identify these scenarios, we interviewed and collected surveys from nonfiction authors, scholarly communications officers, and copyright experts. We are grateful for the partnership of the American Association of University Professors, the American Council of Learned Societies, the American Historical Association, and the Modern Language Association, who helped us to reach a wide range of nonfiction authors by distributing the survey to their members. In total, we were in contact with more than sixty nonfiction authors and experts who

shared nearly 150 stories about their experiences. In parallel with this outreach, we consulted sixteen existing fair use best practices statements developed by other authorial communities.[5] In general, the issues most frequently addressed in these fair use best practices statements overlapped with the issues that nonfiction authors raised in our interviews and surveys.

After identifying the common situations that nonfiction authors encounter, we conducted an analysis of the sixteen existing best practices statements to analyze the principles and limitations other authorial communities have deemed applicable to these situations. As others have noted, a "meta-consensus" is emerging across various fields on how fair use applies to given scenarios.[6] From this body of work, we identified and distilled common approaches to these situations. In some places, we have directly incorporated language from existing codes. In addition, we consulted existing fair use case law to provide real-world examples of how these common situations have been resolved in court.

WHAT THIS GUIDE ISN'T

While this guide provides information and strategies for authors who wish to better understand how fair use works in the United States, it does not apply this information to any individual author's specific situation. This guide is not legal advice, nor does using this guide create an attorney-client relationship. Because the applicability of fair use is context-dependent, this guide does not provide bright-line tests or rules for any legal analysis of fair use. The examples here are meant to illustrate common scenarios in which fair use does apply, but they may not apply in your case. Authors' ability to use copyrighted works may also be limited by restrictions other than copyright (e.g. contractual restrictions or privacy laws).

Although all countries include some accommodations for use of copyrighted works in their national laws,[7] copyright law varies by country and the information in this guide applies only to the use of copyrighted material in the United States (regardless of where the copyrighted material originates). This guide does not cover reproductions, distributions, performances,

or other uses outside of the United States, including web-based uses specifically targeted toward other countries, to which those countries' laws may apply.

This document also does not delineate the limits of fair use rights, nor is it an exhaustive guide to all possible applications of fair use. Fair use extends beyond what this guide covers. Indeed, nonfiction authors may make compelling arguments for fair use even outside of the scenarios identified in this guide. Moreover, fair use is not static. It evolves in response to technological changes and, over time, will likely encompass uses that are not addressed in this guide.[8] In addition, nonfiction authors may be able to use copyrighted works based on considerations apart from fair use (e.g., based on permission granted under the terms of a Creative Commons license).

Finally, nonfiction authors do not need to rely on fair use for works that are in the public domain (either because they were never subject to copyright protection or because such protection has expired). But where a work's copyright status is unclear, nonfiction authors may still want to understand whether the use of the

material would be permitted by fair use should the material be protected by copyright.

Please consult an attorney if you would like legal advice about your rights, obligations, or individual situation.

II. FAIR USE FUNDAMENTALS

The text of this Section is adapted (with permission) from language evolved in previous best practices statements and used by Patricia Aufderheide and Peter Jaszi in *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press 2011).

COPYRIGHT LAW PROTECTS CREATIVE WORKS in order to foster the creation of culture. Its best-known feature is protection of owners' rights. But copying, quoting, and generally reusing existing cultural material is critically important to generating new culture. In fact, the cultural value of copying is so important that it is written into the social bargain at the heart of copyright law. The bargain is this: We as society give limited rights to creators to encourage them to produce culture; at the same time, we give

other creators the chance to use that same copyrighted material, without permission or payment, in some circumstances. Without the second half of the bargain, we could all lose important new cultural work.

Fair use is a feature of copyright law that, under certain conditions, permits quotations from copyrighted works without permission or payment. Where it applies, fair use is a user's right. In fact, as the Supreme Court has pointed out, fair use keeps copyright from violating the First Amendment, as new creations inevitably incorporate existing materials. As copyright protects more works for longer periods than ever before, creators face new challenges: Obtaining licenses to incorporate copyrighted sources may become more expensive and more difficult. Sometimes, licenses may simply be unavailable. As a result, fair use is more important today than ever before.

By design, copyright law does not precisely specify how to apply fair use. This gives the fair-use doctrine a flexibility that works to the advantage of users and the public. Rather than following a specific formula, courts take into account all the facts and circumstances of a

specific case to decide if an unlicensed use of copyrighted material is fair. For this reason, whether an unlicensed use of copyrighted material is "fair" differs with the creative field, with technology, and with time.

In weighing the balance at the heart of fair-use analysis, judges are required to weigh four statutory factors: the purpose of the use, the nature of the work used, the extent of the use, and its economic effect. This still leaves much room for interpretation, especially since the law is clear that these are not the only permissible considerations. Despite its flexibility, however, fair use is not unreliable. In reviewing the history of fair-use litigation, we find that judges return again and again to two key questions:

- Did the unlicensed use "transform" the material taken from the copyrighted work by using it for a different purpose or giving it a different meaning than that of the original, or did it just repeat the work for the same intended purpose and value as the original?[9]

- Considering the nature of the copyrighted work and the challenged use, was the material taken appropriate in kind and amount?

If the answers to these two questions are "yes," a court is more likely to find a use fair. Because that is true, such a use is less likely to be challenged in the first place.

Both questions are related to whether the use will cause excessive economic harm to the copyright owner. While copyright owners aren't entitled to an absolute monopoly over all uses of their works, when a use supplants a copyright owner's core market it is unlikely to be fair. For example, a textbook author cannot quote large parts of a competitor's book merely to avoid the trouble of writing her own. Whether the user acted reasonably and in good faith, in light of general practice in his or her particular field, may also influence a judge's fair use determination.

Fair use is widely and vigorously used in many professional communities. Historians regularly quote other historians' writings and textual sources; film-

makers and visual artists use, reinterpret, and critique copyrighted material; scholars illustrate cultural commentary with textual, visual, and musical examples. In some instances, authorial communities have set forth their understandings of fair use in best-practice guides. This guide draws on these guides, from the experience of nonfiction authors themselves, and from related legal precedents. Read on to learn more about how fair use may apply to common situations faced by nonfiction authors.

III. FAIR USE APPROACHES TO COMMON SITUATIONS FACED BY NONFICTION AUTHORS

THIS SECTION DISCUSSES COMMON SITUATIONS faced by nonfiction authors in which fair use may apply. While there are seemingly endless ways that a copyrighted work might be used, nonfiction authors often want to either (1) criticize, discuss, or comment on copyrighted material or (2) use the copyrighted material to support a point made in the author's work. Another use that is increasingly relevant to nonfiction authors is (3) using copyrighted material for non-consumptive research (e.g. copying works into digital databases in order to perform computational analysis across texts and/or images). This section provides examples of ways that nonfiction authors encounter these three situations, shares the fair use principles that creative communities and courts apply in similar situations, and

explains the limitations that apply to these principles. It also provides some real-world examples of how these situations have been treated in the courts and tests your knowledge through hypotheticals.

At the outset, it is important to note that these situations are concerned not with what the copyrighted material *is* (e.g., a poem, a song, a line of software code, etc.). A common misunderstanding is that fair use outcomes are highly dependent on whether the material being used is textual versus musical or visual, highly creative versus factual, or unpublished versus published. Though the "nature of the copyrighted work" is a factor in fair use analysis, other factors tend to carry far greater weight. Chief among them is whether a new use is sufficiently "transformative" of the original work, meaning that the new work alters the original with "a further purpose or different character, altering the first with new expression, meaning, or message."[10] Therefore, considering the purpose behind an intended use is of paramount importance in determining whether the use is fair or infringing, and the principles and limitations described below apply regardless of the type of copyrighted material being used.

ONE: CRITICIZING, DISCUSSING, OR COMMENTING ON COPYRIGHTED MATERIAL

Nonfiction authors often engage in critical analysis of specific copyrighted works and want to use some or all of that material in their new works. In these cases, nonfiction authors are specifically discussing the copyrighted material: the copyrighted work is itself the focus of their social, political, or cultural critique. This type of critical engagement is exactly what fair use is meant to allow.

Guidance from Best Practices Statements

In nearly all of the best practices statements, creative communities have concluded:

Principle

Fair use applies when the copyrighted material is being used for the purposes of criticism, commentary, or discussion of the work itself (subject to the limitations below).[11]

Court decisions also strongly support this principle. Sometimes copying is essential to an author's purpose and, without it, a reader wouldn't be able to understand her critique. Also, on a broader level, the ability to freely investigate and criticize existing materials is considered essential to freedom of expression. For these reasons, courts often refer to fair use as a "safety valve" that prevents copyright law from being used as a tool of intimidation to silence unpopular or critical ideas. But it is also important to note that criticism, commentary, or discussion does not have to be negative to be eligible for fair use; fair use protects positive criticism, commentary, and discussion as well.

The right to criticize, discuss, and comment on copyrighted material is not absolute. Creative communities and courts have identified several important limitations that can guide authors.

A key limitation is that authors should only use as much of the copyrighted work as is reasonably appropriate to enable the reader to understand the criticism, commentary, or discussion.

Limitation

The amount copied should be reasonably appropriate in light of the analytical purpose.[12]

Another limitation is that there should be a clear connection between the criticism, commentary, or discussion and the use of the copyrighted material. Authors should be able to explain the relevance of the copyrighted material to the critical comment being made.

Limitation

The use of copyrightable material should be justified by the analytical purpose.[13]

Finally, it is considered best practice to credit, in a reasonable manner, the author of materials that are copied.

Limitation

Reasonable attribution should be given to the author of the copyrighted material.[14]

U.S. copyright law does not require attribution.[15] However, courts may weigh the fact that a work is

attributed in favor of fair use, and authorial communities consider it a mark of integrity—and just good manners—to acknowledge sources. Any attribution given should be in the form and manner customary to the relevant authorial community.

Guidance from Legal Cases

Legal decisions evaluating the use of copyrighted materials also support the principle that fair use applies when copyrighted material is used to criticize, discuss, or comment on the copyrighted material. Here are some real-world examples:

When an author wrote a 168-page biography and career retrospective of the artist Basil Gogos, he included 24 copies of Gogos' monster artwork that had previously been used for magazine covers.[16] A court found this use to be a fair use, in part because the author used Gogos' illustrations "to pay homage to his artistic accomplishments" and included commentary from those in the movie industry who discussed the quality of his work. The court also

observed that the author used only a "small portion" of the original magazines, and that he was not required to change the images to black-and-white or use smaller sizes because "making these changes would directly thwart one of the key purposes of the book...."

A scholar wrote a critical review of *Blood of My Blood*, an unpublished novel by Marjorie Rawlings.[17] The Fourth Circuit found that the critical review was a fair use, in part because it was a scholarly appraisal of the work with the purpose of criticizing and commenting on the work. The court further found that while the paper quoted about four- to six- percent of the total novel and paraphrased additional portions, the scholar did not quote or paraphrase more than was necessary to effectively criticize and comment upon the work.

Test Your Knowledge: Criticizing, discussing, or commenting on copyrighted material

Art historian Martha Marx wants to include reproductions of Freddy Fresco's paintings in her book* Class, Clout, and Color, *which analyzes how class and power struggles are reflected in the artist's work. Does fair use apply?

Since Martha Marx is specifically discussing Freddy Fresco's paintings, her use is fair-use eligible under the principle discussed above. However, Martha will need to review the limitations to this principle to ensure that her use does not exceed the limits of fair use.

When reviewing the limitations, Martha Marx will find that she should only use as much of Freddy's paintings as reasonably appropriate to enable her reader to understand her analysis of how class and power struggles are represented in Freddy's works. What amount is "reasonable" depends on context. In some situations, Martha may only need to use a thumbnail or section of one of Freddy's paintings to communicate her point. In other cases, she may need to reproduce an entire painting in detail for her point

to be clear. Further, Martha should make it clear in the text of her book why each work has been reproduced. Finally, she should credit the paintings to Freddy Fresco in a reasonable manner.

Carl Critic wants to include passages from the new novel* For Whom the Phone Beeps *in his literary review of the work. Does fair use apply?

As with Martha's use, Carl Critic's use is fair-use eligible because he is commenting on *For Whom the Phone Beeps* in his literary review. But Carl will still need to review the limitations to this principle. When he does, Carl will find that he should limit the length of passages he uses from the book to those that are reasonably appropriate to help his readers understand the point he is making in his review. He should also tie the passages he uses to his critical analysis of the novel, and he should give reasonable attribution to the novel's author.

TWO: USING COPYRIGHTED MATERIAL TO ILLUSTRATE, SUPPORT, OR PROVE AN ARGUMENT OR A POINT

Nonfiction authors regularly use copyrighted material to illustrate, support, or prove an argument. Unlike when an author is criticizing, discussing, or commenting on the copyrighted material, here the material being used is not itself the object of the author's commentary. Rather, the material is being used to support a related point made by the nonfiction author. In other words, nonfiction authors want to use copyrighted material to "show their work" and lend credibility to their theories and arguments. For example, a nonfiction author may want to use passages from letters to support her theory that Percy Poet's poems about fatherhood were based on his close relationship with his daughter.

Guidance from Best Practices Statements

In nearly all of the best practices statements, authorial communities have concluded:

Principle

Fair use applies when the copyrighted material is being used to illustrate, support, or prove an argument or a point (subject to the limitations below).[18]

This is also a longstanding principle reflected in court decisions.[19] The principle recognizes that authors' arguments are much stronger and clearer when they are supported by examples.

Existing best practices statements and courts identify several important limitations that can guide authors when they are using copyrighted material to illustrate, support, or prove an argument or a point.

Again, a key limitation is that authors should only use as much of the copyrighted work as is reasonably appropriate for the reader to assess the validity of their point.

Limitation

The amount copied should be reasonable in light of the illustrative purpose.[20]

Another limitation is that merely decorative or entertaining uses of copyrighted material under the guise of illustration are inappropriate. Instead, there should be a clear connection between the copyrighted material and the point being made. That said, at least one statement of best practices explicitly states that "should a work chosen for its significance to an argument also be entertaining, that fact should not disqualify the use from being considered fair."[21]

Limitation

The copyrighted material should not be reproduced for its intrinsic, expressive purpose. Uses that are solely decorative or entertaining should be avoided.[22]

Finally, it is considered best practice to credit, in a reasonable manner, the author of materials that are copied.

Limitation

Reasonable attribution should be given to the author of the copyrighted material.[23]

As discussed above, U.S. copyright law does not require attribution. Still, authorial communities consider it a best practice to acknowledge sources and courts may weigh the fact that a work is attributed in favor of fair use. Attribution should be in the form and manner customary to the relevant authorial community using the copyrighted material.

Guidance from Legal Cases

Legal decisions evaluating the use of copyrighted materials support the principle that fair use applies when copyrighted material is used to illustrate, support, or prove an argument or a point. Here are some real-world examples:

The Second Circuit held that an author's use of L. Ron Hubbard's writings in a critical biography was a fair use, in part because the author used the quotes to support the points he was making about Hubbard's character.[24] The court stated that some of the quotations were used "to convey the author's perception of Hubbard's hypocrisy and pomposity,"

and that these qualities "may be best (or only) be revealed through direct quotations." Further, the court found that the author used only a "small percentage" of Hubbard's work and that "some conjuring up of the copyrighted work is necessary" for the author's purposes.

When a biographer quoted from Richard Wright's unpublished letters and journal entries, the Second Circuit found that the use was a fair use.[25] According to the court, the "biography's use of Wright's expressive works is modest and serves either to illustrate factual points or to establish [the author's] relationship with [Wright], not to 'enliven' her prose."

Test Your Knowledge: Using copyrighted material to illustrate, support, or prove an argument or a point

Bernard Biographer theorizes that Francie Francophile's two years in Paris had a profound influence on her song-writing. Bernard wants to use excerpts of the Francie's diary and lyrics from her songs in his biography,* The Sway of the Seine*, to document the connection between Francie's Parisian adventures and the themes in her discography. Does fair use apply?

Since Bernard wants to use the copyrighted material from Francie's diary and songs to lend credibility to his theory, his use is fair-use eligible under the principle described in this section. However, if he wants to stay comfortably within the bounds of fair use, Bernard will need to review the limitations to this principle. Bernard will find that the limitations suggest that he should limit the length of excerpts from Francie's diary and lyrics from her songs to an amount that will allow his reader to assess the validity of his theory about her time in Paris and her songwriting, but no more. What

amount is "reasonable" depends on the context. For example, at some point in his book Bernard may need to copy several entries from Francie's diary to lend credence to his theory, but at another point, a choice quote or two may be sufficient. Likewise, in some cases Bernard may need to use several verses from Francie's songs to support his point, while in other cases a line or two will suffice. Moreover, Bernard should avoid including passages from Francie's diary or lyrics from her songs that are entertaining but unrelated to the points he is making in his biography. Finally, Bernard should credit the material to Francie in a reasonable manner.

Eva Equality wants to use images from magazine advertisements in her book,* (Ms.)placed Messaging, *to illustrate her argument about gender stereotypes in the mid-20th century. Does fair use apply?

Eva's use is fair-use eligible because she wants to use the copyrighted advertisements to illustrate her argument. But, like Bernard, she will need to review the limitations to this principle to make sure her use does

not exceed the limits of fair use. Eva will find that the limitations suggest that she should only use as much of the advertisements as reasonably appropriate to enable her reader to assess the validity of the point that she is making. In some cases, she may need to copy the entire advertisement to illustrate her point. In other cases, a telling detail from a section of the advertisement or a small-scale version of the image may be enough. She should avoid just showcasing advertisement images without adding additional content that makes it clear how these images support her argument about gender stereotypes. Finally, she should credit the magazine advertisements in a reasonable manner if the original authors are known.

THREE: USING COPYRIGHTED MATERIAL FOR NON-CONSUMPTIVE RESEARCH

Advances in technology offer exciting new research tools for nonfiction authors as well as cutting-edge cases for fair use eligibility. One of these new tools is software that enables nonfiction authors to copy works into digital databases in order to perform computational analyses across aggregated sets of texts or images. In these cases, the nonfiction author is not reading, displaying, or sharing large portions of the copyrighted material, but is instead using data mining technology to derive factual information about the works and incorporate those findings into her writings. For example, a nonfiction author may import works into a database and then use data mining technology to count the number of times a word appears in a collection of works, or to understand how frequently a particular species of mouse is used as a test subject.

Non-consumptive research has been common for some time in scientific and technical fields. Now, nonfiction authors in a wide variety of disciplines, including

social sciences and humanities, are also starting to harness new technologies to use copyrighted material for non-consumptive research. While this scenario has not been widely addressed in the existing best practices statements, existing case law strongly supports non-consumptive uses of copyrighted material.

This section addresses nonfiction authors who create their own digital databases of the works on which they want to do nonconsumptive research. It also applies to nonconsumptive research carried out on databases as to which there are no contractual restrictions on text or data mining.

Guidance from Legal Cases

Legal decisions evaluating the use of copyrighted materials for non-consumptive purposes provide strong support for such uses being fair. Here are some real-world examples:

Libraries made digital copies of the books in their collections to create a full-text searchable database of the scanned books, among other uses.[26] The

Second Circuit held that this was a fair use, finding that "the creation of a full-text searchable database is a quintessentially transformative use... [as] the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn."

Google made digital copies of millions of books and made them available to search through its Google Books service so that users could identify relevant words, terms, or snippets from the scanned text.[27] The service allowed users to, for example, "track the frequency of references to the United States as a single entity ("the United States is") versus references to the United States in the plural ("the United States are") and how that usage has changed over time." The Second Circuit held that Google Books service was a fair use, finding that "the purpose of Google's copying of the original copyrighted books is to make available significant information *about those books,"* a different function from that of the original books.

A company created an online plagiarism detection service that included copies of student papers in its reference database.[28] The Fourth Circuit held that the use of student papers in the database was a fair use, in part because the company used the papers for an entirely different purpose than the original: to prevent plagiarism and protect the students' written works from plagiarism.

Guidance from Best Practices Statements

As mentioned above, it is too early for meta-consensus to have emerged across best practices statements about this scenario. However, one existing best practices guide closely related to nonfiction authors does address this point. *The Code of Best Practices in Fair Use for Academic and Research Libraries* explains that libraries can offer scholars digital databases of collection items on which to perform computerized analyses and notes that these non-consumptive uses are highly transformative, creating powerful new scholarly resources that are not at all a mere substitute for the original works. The Code also notes that courts have found

search engines, which copy millions of web pages into their indexed databases in order to help users find relevant sites, to be fair uses because they reveal facts about a collection of works rather than focusing on the protected expression in any single work.

The Code of Best Practices in Fair Use for Academic and Research Libraries concludes that it is fair use for libraries to develop and facilitate the development of digital databases of collection items to enable non-consumptive analysis across the collection for both scholarly and reference purposes.[29] The statement acknowledges that the case for fair use will be at its strongest when the database includes information such as rich metadata that augments the research or reference value of its content.

As the Code acknowledges, scholars can employ such databases to develop new and powerful reference tools.

Principle

It is fair use for nonfiction authors to develop digital databases in order to perform non-consumptive analysis of copyrighted materials for both scholarly and reference purposes (subject to the limitations below).

The statement also flags some important limitations to this principle.

Limitation

Copyrighted material digitized for non-consumptive uses should not be employed in other ways (e.g., to provide digital access for ordinary reading) without independent justification, either by a license from the rights holder or pursuant to a statutory exception.[30]

Test Your Knowledge: Using Copyrighted Material for Non-Consumptive Research

In her scholarly book on the effect of the Roswell UFO conspiracy on pop culture, Gail Galaxy wants to demonstrate that science fiction writing has become more down to earth in recent years. To do so, she wants to copy the text of sci-fi bestsellers since 1947 to create a database of the aggregated text to count the number of times the words "UFO," "alien," and "extraterrestrial life" appear in the collection. Does fair use apply?

Because Gail wants to create a digital database of copyrighted material for non-consumptive analysis across the collection for scholarly purposes, her use is fair-use eligible under the principle described in this section. However, Gail will need to review the limitations to this principle to ensure that her use stays within the bounds of fair use. Gail will find that the limitations suggest that she should not use the copyrighted material in the sci-fi bestsellers database in other ways (for example, to provide digital access to the entire text of the books),

unless she has an independent justification for doing so (such as a license from the rights holder).

IV. FREQUENTLY ASKED QUESTIONS

THIS SECTION COVERS SOME OF THE MOST frequently asked questions about fair use and clears up some common misconceptions about when it may apply.[31]

Can I still claim fair use if I am using copyrighted material that is highly creative?

Yes. While courts do consider whether the copyrighted material used is primarily factual or creative under the second factor, "the nature of the work," this factor is rarely decisive on its own. Courts still must weigh all four factors, including the "purpose of the use." Where the purpose of the use is transformative, such as when a nonfiction author comments on copyrighted material

or uses copyrighted material to support a point, and the amount used is reasonable, the second factor rarely affects the final outcome of fair use cases.[32]

Can I still claim fair use if I am using copyrighted material for commercial purposes?

Yes. While "noncommercial" uses may be a plus in a fair use analysis, there are no categorical rules: Commercial uses can be fair use, and not all noncommercial uses will be fair use. In fact, some of the important court victories for fair use over the past two decades have been won by defendants whose activities were commercial, including musicians, publishers, and artists who sell their work (sometimes at substantial prices).

Can I still claim fair use if I ask the copyright owner for permission to use the material and permission is refused?

Yes. You do not have to ask permission or alert the copyright holder when a use of materials is protected by fair use. But, if you choose, you may inquire about permissions and still claim fair use if your request is

refused or ignored. In some cases, courts have found that asking permission and then being rejected has actually enhanced fair use claims. In fact, the Supreme Court has said that asking for permission may be a good faith effort to avoid litigation.[33]

Can I still claim fair use if I want to use copyrighted material that is unpublished?

Yes. Congress amended the Copyright Act in 1992 to explicitly allow for fair use when using unpublished works after several court decisions suggested that the use of unpublished materials would rarely be fair use. Under current copyright law, the fact that a work is unpublished "shall not itself bar a finding of fair use if such finding is made upon consideration of all the [fair use] factors."[34] While a court may still consider a work's unpublished status to weigh against fair use when evaluating the "nature of the work," this factor is rarely decisive on its own and courts still must weigh all of the fair use factors, including the purpose of the use. The purpose of the use may weigh against fair use if the unpublished material is being used in a frivolous

or exploitative manner. On the other hand, the purpose of the use may weigh in favor of fair use if the unpublished material transforms the original material (by, for example, using the original material as the object of criticism or commentary) and contributes to the public's interest in advancing knowledge.

Are charts, graphs, and tables protected by copyright and, if so, can I rely on fair use to incorporate them into my nonfiction work?

Charts, graphs, and tables may be protected by copyright, but the underlying facts are not copyrightable. See **Section V** for more information about copyright eligibility. Creative choices in the way that facts are presented in a chart, graph, or table may be sufficiently original to warrant copyright protection. That said, where applicable, you may still be able to rely on fair use to use a chart, graph, or table that includes expressive elements. A good place to start is to see whether your use fits within the principles and limitations addressed in **Section III**.

How does a work's copyright status affect fair use?

Copying of works that are not protected by copyright is not copyright infringement, regardless of fair use. But sometimes it can be difficult to determine whether a work is protected by copyright. For example, you may not be able to determine whether a work's copyright has expired, or you may not be sure whether a scientific chart has the requisite level of creativity to warrant copyright protection. Even where you cannot determine a work's copyright status, you may still want to understand whether the use of the material would be permitted by fair use should the material be protected by copyright. In fact, in some cases determining whether the use would be permitted by fair use may be easier than resolving the work's copyright status.

How does a work's orphan work status affect fair use?

Orphan works are works for which it is difficult or impossible to identify or locate the work's copyright owner, even after a diligent search. The use of an orphan work may be permitted by fair use, just like any other work. In fact, orphan works often have charac-

teristics that make fair use more likely. For example, orphan works are by definition not active in the market, limiting any resulting economic harm to rightsholders.[35] In some cases, determining whether the use of an orphan work would be permitted by fair use may be significantly easier than securing permission from a rights holder that, by definition, is difficult or even impossible to track down.

Can contractual terms governing access to a work restrict the availability of fair use?

Yes. For example, some archives, museums, and commercial collections that control access to works place contractual restrictions on the use of those works, even when use of the work would otherwise be permitted by fair use (and, in some cases, even when the work itself is in the public domain!). This is beginning to change, and some archives and museums have already abandoned these practices. However, if you are a party to such a contract, your ability to use materials you've accessed may be limited by the terms of the contract. For example, a biographer who accesses her subject's

personal papers through an archive may find that, as a condition of accessing those materials, the subject's estate forbids quoting from the materials without the express permission of the estate. Similarly, an art critic may find that he has agreed to terms governing the use of photographs he accessed through an online archive.

At least some courts have held that such contracts may be enforced, even if the restricted use would be fair use as a matter of copyright law. In these cases, nonfiction authors cannot rely on fair use since demands for permission in this context are based on contractual claims, not copyright. As such, nonfiction authors should pay careful attention to the conditions of access to source materials and may want to consider negotiating for better terms that do not restrict their research and writing goals.

Does the information in this guide still apply if my work will be published outside of the United States?

No. "Fair use" as described in this guide is unique to U.S. copyright law. The information in this guide does not apply to reproductions, distributions, performances,

or other uses outside of the United States, including web-based uses specifically targeted toward other countries, to which those countries' laws may apply. That said, a growing number of countries have similar "fair use" or "fair dealing" limitations and exceptions, and criticism and commentary are often protected by these regimes. If your work is being published in a country other than the United States, you may want to consult an attorney about similar limitations and exceptions that may apply.

Does the fair use analysis change when the copyrighted material I want to use is owned by a litigious estate?

No. Some estates are notoriously aggressive in trying to prevent the use of materials to which they own the copyrights. However, just because a copyright owner is forceful in asserting copyright claims doesn't make fair use any more or less likely. It may, however, change your assessment of the practical risk that a copyright owner might complain or sue. Authors in this situation may be especially interested in obtaining errors and omissions coverage prior to publicizing their work.

What can I do if my publisher asks me to obtain permission instead of allowing me to rely on fair use?

Some publishers may require that authors get permission to use copyrighted materials in their works instead of allowing them to rely on fair use. If you find yourself in this situation, you may find it helpful to ask your publisher to reconsider its position and to explain why your intended use is protected by fair use based on your analysis of the principles and limitations in this guide. You may also want to share with them related codes of best practices, if relevant. If fair use is important to you or essential to your project, you may want to search for a publisher that recognizes fair use before signing a publishing contract.

Does fair use protect against claims based on legal rights other than copyright, such as privacy rights, trademark, defamation, right of publicity, and more?

No. Fair use as described in this guide is a limitation on exclusive right under *copyright* and does not apply to other legal claims. When using third party materials, authors should consider legal issues beyond copyright,

such as contractual restrictions, privacy rights, trademark law, right of publicity, and defamation; and community norms, like rules against academic plagiarism.[36] This guide does not address these issues.

V. BEYOND FAIR USE

EVEN IF YOUR INTENDED USE OF A COPYRIGHTED work doesn't qualify as a fair use, there are still ways you might be able to use the work (or something similar). If your intended use is unlikely to be a "fair use," here are some options you might explore:

MODIFY YOUR INTENDED USE

If you still think that use of the copyrighted work is essential to your project, but your intended use doesn't fit within the principles and limitations discussed in **Section III**, consider modifying your intended use to align with these principles and limitations. For example, you may find that using less of the copyrighted work, providing additional context for the work, or adding additional commentary to your text might

bring your use in line with the principles and limitations articulated in this guide.

ASK THE COPYRIGHT OWNER FOR PERMISSION OR A PAID LICENSE TO USE THE WORK

Some copyright owners may allow others to reproduce and use their works at no cost, especially if attribution is given. Other copyright owners might offer a license for the use of their copyrighted works in exchange for payment. Since the cost and restrictions imposed on licensed works vary widely, it's important to pay close attention to the terms of the license. When authors incorporate copyrighted works into their own, they typically do so under a nonexclusive license agreement. Nonexclusive licenses do not require written agreements, though you may want written confirmation for your records.[37]

USE WORKS DISTRIBUTED UNDER OPEN LICENSES

Some works are available under open licenses that allow for specific uses without the need to seek addi-

tional permission from the copyright owner. For example, many works (like this guide!) are distributed under a Creative Commons CC-BY license, which allows a user to "copy and redistribute the material in any medium or format" and "remix, transform, and build upon the material for any purpose, even commercially," so long as proper attribution is given and your changes are indicated.[38] Similarly, many museums distribute photographs of works in their collections under open access licenses.[39]

Caution

Keep in mind that there are many different types of open licenses and not all are equally permissive. For example, some open licenses do not allow the material to be used for commercial purposes. It is important to think carefully about the terms provided before including any open-licensed works in your project.[40]

USE WORKS FROM THE PUBLIC DOMAIN

Works that are not protected by copyright are in the "public domain" and may be freely copied (unless other restrictions apply, such as those imposed by contractual restrictions). Works may enter the public domain because their copyright protection expired, because they are not eligible for copyright protection, or because the copyright owner dedicated the work to the public domain.

Copyright Duration

If the copyright in a work has expired, it is in the public domain. With a few exceptions, works first published in the United States prior to January 1, 1923 are in the public domain because any copyright protection that those works may have once had has expired. A work may still be in the public domain even if it was published after this date, but determining a work's public domain status can be complicated. For more information about how to evaluate whether a work is in the public domain, check out Berkeley Law's Samuelson

Law, Technology & Public Policy Clinic's *Is it in the Public Domain?*[41] handbook, Peter Hirtle's *Copyright Term and the Public Domain in the United States*[42] chart, or similar resources.

Copyright Eligibility

Material not protected by copyright is in the public domain. Copyright does not protect facts, even if those facts were difficult to collect. For instance, suppose that a historian spent several years reviewing field reports and compiling an exact, day-by-day chronology of military actions during the Vietnam War. Even though the historian expended significant time and resources to create this chronology, the facts themselves would be free for anyone to use.

Caution

According to the Supreme Court, only a "modicum of creativity" is required for creative expression to be considered "original" for the purposes of copyright protection. Therefore, even if a work only contains well-known facts, the way these facts are expressed

might be sufficiently "original" to be protected by copyright.

Copyright also does not protect ideas, processes, systems, method of operations, concepts, principles, or discoveries—no matter how original or creative. Copyright protects only the expression contained in a work, not the underlying ideas or concepts. For example, copyright prohibits others from copying the text of the novel *The Old Man and the Sea* without the copyright owner's permission (or unless the use is allowed under an exception to copyright). But copyright doesn't prevent someone else from writing their own novel about fishing, fate, Cuba, or any of Hemingway's other themes.

Finally, works created by the United States federal government are also not eligible for copyright protection, though works created by U.S. state governments or foreign governments may be.[43]

Public Domain Dedication

Copyright owners can dedicate their works to the public domain by, for example, using a Creative Commons CC0 license.[44]

APPENDIX: PRINCIPLES AND LIMITATIONS FROM EXISTING STATEMENTS OF BEST PRACTICES IN FAIR USE

THE FOLLOWING TABLES REPRODUCE THE fair use principles and limitations from existing statements of best practices on fair use. These principles and limitations were developed through consultation with participants who represent the communities each statement serves. In deliberative meetings, participants were prompted to discuss common fair use issues that arise in their communities. The resulting principles and limitations reflect each community's shared views on fair use. These statements were reviewed by outside copyright experts before publication.[45] The principles and limitations outlined in this guide for nonfiction authors are derived from these statements.

TABLE 1

SOURCE	PRINCIPLE
Code of Best Practices in Fair Use for Online Video Commenting on or critiquing of copyrighted material	Video makers have the right to use as much of the original work as they need to in order to put it under some kind of scrutiny. Comment and critique are at the very core of the fair use doctrine as a safeguard for freedom of expression. So long as the maker analyzes, comments on, or responds to the work itself, the means may vary. Commentary may be explicit (as might be achieved, for example, by the addition of narration) or implicit (accomplished by means of recasting or recontextualizing the original). In the case of negative commentary, the fact that the critique itself may do economic damage to the market for the quoted work (as a negative review or a scathing piece of ridicule might) is irrelevant.
Code of Best Practices in Fair Use for Open CourseWare Critique and Analysis	The investigation of preexisting works of authorship is an essential part of education, freedom of inquiry, and freedom of expression. Thus, this is a core example of fair use. Whatever the original informative or entertainment purpose that underlay the creation of the copyrighted material, it is being repurposed here as an object of commentary or other related discourse. This use of preexisting information or entertainment materials is a classic mode of advancing learning in the conventional face-to-face classroom, and it should be equally available in any OCW.

LIMITATIONS

The use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience's taste for the thing (or the kind of thing) that is being quoted. In other words, the new use should not become a market substitute for the work (or other works like it).

Because the fair use status of third-party material used for critique, analysis, or both depends in part on the critical value added by the creator of the OCW materials, certain considerations should be borne in mind.

- Although commentary can be negative or positive, and express or implied, the purposes for which the copyrighted material has been incorporated should be reasonably clear, and to the extent possible, the commentary should be integrated with the copyrighted material.
- Wherever possible, incorporated material should be drawn from primary sources.
- The extent of the use should be no more than is reasonably needed for the critical purpose.
- Copyrighted material used pursuant to fair use should be attributed where reasonably possible.

SOURCE	PRINCIPLE
Code of Best Practices in Fair Use for Poetry Criticism, comment, illustration	Under fair use, a critic discussing a published poem or body of poetry may quote freely as justified by the critical purpose; likewise, a commentator may quote to exemplify or illuminate a cultural/historical phenomenon, and a visual artist may incorporate relevant quotations into his or her work.
Code of Best Practices in Fair Use for Scholarly Research in Communication Analysis, criticism, and commentary about copyrighted materials	No category of use illustrates transformative fair use better, or is more widely regarded as legitimate in everyday scholarly practice, than this one. Nevertheless, copyright owners often refuse to permit such uses when asked, or seek to impose unacceptable terms and conditions (such as the right to review the scholar's work). Nevertheless, scholars may confidently invoke fair use to employ copyrighted works for purposes of analysis, criticism, or commentary directed toward those works. This fair use, made to enable the research, extends as well to the distribution of their research results, whether in the classroom, on a Web site, in printed work, in conference presentations, or by other methods of disseminating scholarly knowledge.

LIMITATIONS

This principle does not apply to reproductions in textbooks and anthologies where quotations appear without an independent critical apparatus. Quoted passages should be reproduced as accurately as possible to reflect, and not so minimally or selectively as to mislead about, creative choices embedded in the poem. Critics, commentators, and artists should provide conventional attribution for their chosen quotations. They should also have an articulable rationale for the relevance of their chosen quotations to their own work. Likewise, the extent of the quotation should be appropriate to the purpose of the use. Uses that are solely "decorative" or "entertaining" should be avoided. Permissible quotations used for exemplary purposes generally should be briefer than those used for critical purposes. Visual artists generally should not incorporate entire poems in a merely decorative fashion without the copyright holder's permission.

- A scholar should determine the extent of use based on the scholar's analytic objective. The scholar should not employ more than is needed for the scholarly objective, either to conduct the original research or to explain it to others.
- Scholars should provide citations in a form and manner typically used in communication scholarship for the material used in any publication of shared results of the study.

SOURCE	PRINCIPLE
Code of Best Practices in Fair Use for the Visual Arts Analytic Writing	In their analytic writing about art, scholars and other writers (and, by extension, their publishers) may invoke fair use to quote, excerpt, or reproduce copyrighted works, subject to certain limitations.
Documentary Filmmakers' Statement of Best Practices in Fair Use Employing copyrighted material as the object of social, political, or cultural critique	Such uses are generally permissible as an exercise of documentarians' fair use rights. This is analogous to the way that (for example) a newspaper might review a new book and quote from it by way of illustration. Indeed, this activity is at the very core of the fair use doctrine as a safeguard for freedom of expression. So long as the filmmaker analyzes or comments on the work itself, the means may vary. Both direct commentary and parody, for example, function as forms of critique. Where copyrighted material is used for a critical purpose, the fact that the critique itself may do economic damage to the market for the quoted work (as a negative book review could) is irrelevant. In order to...

LIMITATIONS

- The writer's use of the work, whether in part or in whole, should be justified by the analytic objective, and the user should be prepared to articulate that justification.
- The writer's analytic objective should predominate over that of merely representing the work or works used.
- The amount and kind of material used and (where images are concerned) the size and resolution of the published reproduction should not exceed that appropriate to the analytic objective.
- Justifications for use and the amount used should be considered especially carefully in connection with digital-format reproductions of born-digital works, where there is a heightened risk that reproductions may function as substitutes for the originals.
- Reproductions of works should represent the original works as accurately as can be achieved under the circumstances.
- The writing should provide attribution of the original work as is customary in the field, to the extent possible.

There is one general qualification to the principle just stated. The use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience's taste for the thing (or the kind of thing) critiqued. In other words, the critical use should not become a market substitute for the work (or other works like it).

SOURCE	PRINCIPLE
Documentary Filmmakers' Statement of Best Practices in Fair Use (cont.)	...qualify as fair use, the use may be as extensive as is necessary to make the point, permitting the viewer to fully grasp the criticism or analysis.
Set of Principles in Fair Use for Journalism Use of copyrighted material as proof or substantiation in news reporting or analysis	Fair use applies when journalists use copyrighted material as documentation, to validate, prove, support, or document a proposition.
Set of Principles in Fair Use for Journalism When copyrighted material is used in cultural reporting and criticism	The use of textual, visual and other quotations of cultural material for purposes of reporting, criticism, commentary, or discussion constitutes fair use.

LIMITATIONS

- The journalist should take as much as is reasonably appropriate to enable the news consumer to assess validity of a journalist's assertions and interpretations.
- The journalist should consider the value of the copyrighted material to the public's understanding of and confidence in the reporting.
- The journalist should attribute the material in a reasonable manner.

- The journalist should take as much is reasonably appropriate to enable the news consumer to understand the point being made.
- The journalist should contextualize the material to make clear its relevance to the current work.
- The journalist should make the connection between the cultural criticism or commentary and the selection of copyrighted material clear to the news consumers, by means of text references, captions, voice-over, or other signaling.
- The journalist should honor any promises that he or she has affirmatively made to the provider of copyrighted cultural material (such as video clips from new movies).
- The journalist should attribute the material in a reasonable manner.

TABLE 2

SOURCE	PRINCIPLE
Code of Best Practices in Fair Use for Online Video Using copyrighted material for illustration or example	This sort of quotation generally should be considered fair use and is widely recognized as such in other creative communities. For instance, writers in print media do not hesitate to use illustrative quotations of both words and images. The possibility that the quotes might entertain and engage an audience as well as illustrate a video maker's argument takes nothing away from the fair use claim. Works of popular culture typically have illustrative power precisely because they are popular. This kind of use is fair when it is important to the larger purpose of the work but also subordinate to it. It is fair when video makers are not presenting the quoted material for its original purpose but to harness it for a new one. This kind of use is, thus, creating new value.
Code of Best Practices in Fair Use for Open CourseWare Copyrighted Material Used for Illustration	Illustrative uses are essential for effectively portraying and explaining information to learners. Practices vary around the licensing of illustrative examples in learning materials (such as textbooks) created for sale. In nonprofit education settings, however, the instructor's right to use relevant examples under fair use has never been successfully challenged in a court of law. The drafters of this code believe that OCW makers should enjoy the same use rights as other educators. This principle applies to any copyrighted material, from historical letters to YouTube videos.

LIMITATIONS

To the extent possible and appropriate, illustrative quotations should be drawn from a range of different sources; and each quotation (however many may be employed to create an overall pattern of illustrations) should be no longer than is necessary to achieve the intended effect. Properly attributing material, whether in the body of the text, in credits, or in associated material will often reduce the likelihood of complaints or legal action and may bolster a maker's fair use claim.

Relevance is the key concept distinguishing fair uses from questionable ones in this category. OCW providers should look for the relationship between incorporated illustrative material and course objectives.

- The incorporated material should clearly advance an instructor's teaching goals.
- Copyrighted material that serves primarily to add entertainment value to the course should be avoided, as should merely duplicative illustrations that do not add materially to students' understanding.
- The extent of the use should be no more than is reasonably needed for the illustrative purpose.
- Where possible with reasonable effort, the source of the illustration should be attributed.

SOURCE	PRINCIPLE
Code of Best Practices in Fair Use for Poetry Criticism, comment, illustration	Under fair use, a critic discussing a published poem or body of poetry may quote freely as justified by the critical purpose; likewise, a commentator may quote to exemplify or illuminate a cultural/historical phenomenon, and a visual artist may incorporate relevant quotations into his or her work.
Code of Best Practices in Fair Use for Scholarly Research in Communication Quoting copyrighted material for illustration	Scholars may invoke fair use to reproduce copyrighted material where it serves to explain or illustrate their scholarly insights or conclusions about communications in relation to social, cultural, political, or economic phenomena. Generally speaking, such uses transform the material reproduced by putting it in an entirely new context; thus, a music video clip used to illustrate trends in editing technique or attitudes about race and gender is being employed for a purpose entirely distinct from that of the original, and is typically directed to an entirely distinct audience from that for which it originally was intended. This is true even in situations where the media object in question is not subjected to specific analysis, criticism, or commentary.

LIMITATIONS

This principle does not apply to reproductions in textbooks and anthologies where quotations appear without an independent critical apparatus. Quoted passages should be reproduced as accurately as possible to reflect, and not so minimally or selectively as to mislead about, creative choices embedded in the poem. Critics, commentators, and artists should provide conventional attribution for their chosen quotations. They should also have an articulable rationale for the relevance of their chosen quotations to their own work. Likewise, the extent of quotation should be appropriate to the purpose of the use. Uses that are solely "decorative" or "entertaining" should be avoided. Permissible quotations used for exemplary purposes generally should be briefer than those used for critical purposes. Visual artists generally should not incorporate entire poems in a merely decorative fashion without the copyright holder's permission.

- A scholar should determine the nature of the excerpt (or the use of a work in its entirety) based on the scholar's academic objective in choosing the illustration; merely decorative or entertaining uses of copyrighted material, under the guise of illustration, are inappropriate. However, should a work chosen for its significance to a scholarly argument also be entertaining, that fact should not disqualify the use from being considered fair.
- A scholar should determine the extent of use (both as to the number of illustrations employed and the amount excerpted from each) based on the scholar's illustrative objective. Scholars should provide citations in a form and manner typically used in communication scholarship for the material used in any publication of shared results of the study.

SOURCE	PRINCIPLE
Code of Best Practices in Fair Use for the Visual Arts Analytic writing	In their analytic writing about art, scholars and other writers (and, by extension, their publishers) may invoke fair use to quote, excerpt, or reproduce copyrighted works, subject to certain limitations.
Documentary Filmmakers' Statement of Best Practices in Fair Use Quoting copyrighted works of popular culture to illustrate an argument or point	Once again, this sort of quotation should generally be considered as fair use. The possibility that the quotes might entertain and engage an audience as well as illustrate a filmmaker's argument takes nothing away from the fair use claim. Works of popular culture typically have illustrative power, and in analogous situations, writers in print media do not hesitate to use illustrative quotations (both words and images). In documentary filmmaking, such a privileged use will be both subordinate to the larger intellectual or artistic purpose of the documentary and important to its realization. The filmmaker is not presenting the quoted material for its original purpose but harnessing it for a new one. This is an attempt to add significant new value, not a form of "free riding"—the mere exploitation of existing value.

LIMITATIONS

- The writer's use of the work, whether in part or in whole, should be justified by the analytic objective, and the user should be prepared to articulate that justification.
- The writer's analytic objective should predominate over that of merely representing the work or works used.
- The amount and kind of material used and (where images are concerned) the size and resolution of the published reproduction should not exceed that appropriate to the analytic objective.
- Justifications for use and the amount used should be considered especially carefully in connection with digital-format reproductions of born-digital works, where there is a heightened risk that reproductions may function as substitutes for the originals.
- Reproductions of works should represent the original works as accurately as can be achieved under the circumstances.
- The writing should provide attribution of the original work as is customary in the field, to the extent possible.

Documentarians will be best positioned to assert fair use claims if they assure that:

- the material is properly attributed, either through an accompanying on-screen identification or a mention in the film's final credits;
- to the extent possible and appropriate, quotations are drawn from a range of different sources;
- each quotation (however many may be employed to create an overall pattern of illustrations) is no longer than is necessary to achieve the intended effect;
- the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.

SOURCE	PRINCIPLE
Set of Principles in Fair Use for Journalism When copyrighted material is used as illustration in news reporting or analysis	Fair use applies to illustration in news reporting.
Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing Use of copyrighted material to illustrate historical, theoretical, or aesthetic arguments	Because the use of examples of copyrighted work within academic publications is generally transformative in purpose and audience, media scholars believe that such use constitutes fair use.

LIMITATIONS

- The illustration should add meaningfully to the audience's understanding of the facts or issues.
- The amount employed should be reasonably appropriate to the illustrative purpose.
- When the illustrative material is provided by a business that provides material primarily designed to illustrate current events, such as a syndicated news service, and the use is for reporting on current events, the journalist should purchase the material.
- The journalist should attribute the material in a reasonable manner.
- Media scholars should only employ as much of the copyrighted work as necessary to illustrate the point or argument. It should be clear in the body of the text or the caption why this work has been chosen.

TABLE 3

SOURCE	PRINCIPLE
Code of Best Practices in Fair Use for Academic and Research Libraries Creating databases to facilitate non-consumptive research uses (including search)	It is fair use for libraries to develop and facilitate the development of digital databases of collection items to enable nonconsumptive analysis across the collection for both scholarly and reference purposes.

LIMITATIONS

Items in copyright digitized for nonconsumptive uses should not be employed in other ways (e.g., to provide digital access for ordinary reading) without independent justification, either by a license from the rights holder or pursuant to a statutory exception. Search access to database materials should be limited to portions appropriate to the nonconsumptive research purpose.

Enhancements: The case for fair use will be at its strongest when the database includes information such as rich metadata that augments the research or reference value of its contents.
Assertions of fair use will be particularly persuasive when libraries cooperate with other institutions to build collective databases that enable more extensive scholarship or reference searching.

ENDNOTES

We gratefully acknowledge Patricia Aufderheide and Peter Jaszi for pioneering the codes of best practices in fair use and for generously providing some of the language we adapted for use in this guide. *See* Patricia Aufderheide & Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press 2011). The second edition of *Reclaiming Fair Use* will be released in 2018.

1. When using third party materials, authors should also consider other legal issues, such as contractual restrictions, privacy rights, and defamation; and community norms, like rules against academic plagiarism, in addition to copyright. This guide does not address these issues.
2. See *infra* note 8.
3. Code of Best Practices in Fair Use for Academic and Research Libraries; Code of Best Practices in Fair Use for Media Literacy Education; Code of Best Practices in Fair Use for Online Video; Code of Best Practices in Fair Use for OpenCourseWare; Code of Best Practices in Fair Use for Poetry; Code Of Best Practices In Fair Use For Scholarly Research In Communication; Code of Best Practices in Fair Use for the Visual Arts; Documentary Filmmakers' Statement of Best Practices in Fair Use; Fair Use and Sound Recordings: Lessons from Community Practices; Set of Principles in Fair Use for Journalism; Society for Cinema and Media Studies' Statement of Best Practices for Fair Use in Teaching for Film and Media Educators; Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing; Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and other Memory Institutions; Statement of Best Practices of Fair Use in

Dance Related Materials; Statement on the Digital Transmission of Audio Reserves; and the Statement on the Fair Use of Images for Teaching, Research and Study. To read these guides, please visit the Center for Media & Social Impact's website, http://cmsimpact.org/codes-of-best-practices/.

4. *See generally*, Anthony Falzone and Jennifer Urban, Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices, 57 J. Copyright Soc'y U.S.A. 337 (2009).
5. *Supra* note 3.
6. Brandon Butler & Peter Jaszi, Fair Use and Sound Recordings: Lessons from Community Practice, available at http://cmsimpact.org/code/fair-use-sound-recordings/ (stating "From a corpus that now encompasses more than a dozen statements and codes, trend lines are becoming clear and a kind of meta-consensus across various fields is emerging.").
7. The Berne Convention, the primary international copyright treaty, requires all members of the Berne Union to have an exception for fair quotation. In addition, several other countries, including Canada, Israel, and Korea, provide for fair use or fair dealing in their national laws.
8. Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev., 2537 (2008). See also U.S. Copyright Office's Fair Use Index, https://www.copyright.gov/fair-use/fair-index.html, and Stanford University Libraries' Summaries of Fair Use Cases, https://fairuse.stanford.edu/overview/fair-use/cases/.
9. Because transformative uses are generally non-substitutional, they do not represent the kind of market harm to which the

fourth fair use factor relates. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

10. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

11. E.g., Code of Best Practices in Fair Use for Online Video (One: Commenting on or critiquing of copyrighted material); Code of Best Practices in Fair Use for Open CourseWare (Two: Critique and Analysis); Code of Best Practices in Fair Use for Poetry (Four: Criticism, comment, illustration); Code of Best Practices in Fair Use for Scholarly Research in Communication (One: Analysis, criticism, and commentary about copyrighted materials); Code of Best Practices in Fair Use for the Visual Arts (One: Analytic Writing); Documentary Filmmakers' Statement of Best Practices in Fair Use (One: Employing copyrighted material as the object of social, political, or cultural critique); Set of Principles in Fair Use for Journalism (Two: Use of copyrighted material as proof or substantiation in news reporting or analysis; Three: When copyrighted material is used in cultural reporting and criticism).

12. E.g., Code of Best Practices in Fair Use for Open CourseWare ("[t]he extent of the use should be no more than is reasonably needed for the critical purpose"); Code of Best Practices in Fair Use for Poetry ("the extent of quotation should be appropriate to the purpose of the use"); Code of Best Practices in Fair Use for Scholarly Research in Communication ("[t]he scholar should not employ more than is needed for the scholarly objective"); Code of Best Practices in Fair Use for the Visual Arts ("[t]he amount and kind of material used and (where images are concerned) the size and resolution of the published reproduction should not exceed that appropriate to the analytic objective"); Set of Principles in Fair Use for Journalism ("[t]he journalist should take as much as is reasonably appropriate to enable the news consumer to assess validity of a journalist's assertions and interpretations" and "[t]he journalist should take as much is reasonably appro-

priate to enable the news consumer to understand the point being made").

13. E.g., Code of Best Practices in Fair Use for Open CourseWare ("the purposes for which the copyrighted material has been incorporated should be reasonably clear, and to the extent possible, the commentary should be integrated with the copyrighted material"); Code of Best Practices in Fair Use for Poetry (critics, commentators, and artists should "have an articulable rationale for the relevance of their chosen quotations to their own work"); Code of Best Practices in Fair Use for the Visual Arts ("[t]he writer's use of the work, whether in part or in whole, should be justified by the analytic objective, and the user should be prepared to articulate that justification"); Set of Principles in Fair Use for Journalism ("[t]he journalist should contextualize the material to make clear its relevance to the current work" and "should make the connection between the cultural criticism or commentary and the selection of copyrighted material clear to the news consumer, by means of text references, captions, voice-overs, or other signaling").

14. E.g., Code of Best Practices in Fair Use for Open CourseWare ("[c]opyrighted material used pursuant to fair use should be attributed where reasonably possible"); Code of Best Practices in Fair Use for Poetry ("[c]ritics, commentators, and artists should provide conventional attribution for their chosen quotations"); Code of Best Practices in Fair Use for Scholarly Research in Communication ("[s]cholars should provide citations in a form and manner typically used in communication scholarship for the material used in any publication of shared results of the study"); Code of Best Practices in Fair Use for the Visual Arts ("[t]he writing should provide attribution of the original work as is customary in the field, to the extent possible"); Set of Principles

in Fair Use for Journalism ("[t]he journalist should attribute the material in a reasonable manner").

15. Though not recognized under U.S. copyright law, many countries grant authors a right of attribution separate from their copyrights. Such so-called "moral rights" differ from country to country. Further, proper attribution is a prerequisite to relying on copyright limitations in many countries outside of the United States, and some countries can be very specific about who needs to receive such attribution. If your work is being published outside the United States, you may need to consult an attorney about what type of attribution may be required.

16. *Warren Publishing Co. v. Spurlock d/b/a Vanguard Productions*, 645 F.Supp.2d 402 (E.D. Pa., 2009).

17. *Sundeman v. The Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998).

18. E.g., Code of Best Practices in Fair Use for Online Video (Two: Using copyrighted material for illustration or example); Code of Best Practices in Fair Use for Open CourseWare (Three: Copyrighted Material Used for Illustration); Code of Best Practices in Fair Use for Poetry (Four: Criticism, comment, illustration); Code of Best Practices in Fair Use for Scholarly Research in Communication (Two: Quoting copyrighted material for illustration); Code of Best Practices in Fair Use for the Visual Arts (One: Analytic Writing); Documentary Filmmakers' Statement of Best Practices in Fair Use (Two: Quoting copyrighted works of popular culture to illustrate an argument or point); Set of Principles in Fair Use for Journalism (Four: When copyrighted material is used as illustration in news reporting or analysis); Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing (One: Use of copyrighted material to illustrate historical, theoretical, or aesthetic arguments).

19. For a thorough analysis of representative cases involving fair use in nonfiction works that surfaces similar principles and limitations discussed in this section, see Michael Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. Copyright Soc'y U.S.A 488–505 (2012).

20. E.g., Code of Best Practices in Fair Use for Online Video ("each quotation (however many may be employed to create an overall pattern of illustrations) should be no longer than is necessary to achieve the intended effect"); Code of Best Practices in Fair Use for Open CourseWare ("[t]he extent of the use should be no more than is reasonably needed for the illustrative purpose"); Code of Best Practices in Fair Use for Poetry ("the extent of quotation should be appropriate to the purpose of the use"); Code of Best Practices in Fair Use for Scholarly Research in Communication ("[a] scholar should determine the extent of use (both as to the number of illustrations employed and the amount excerpted from each) based on the scholar's illustrative objective"); Code of Best Practices in Fair Use for the Visual Arts ("[t]he amount and kind of material used and (where images are concerned) the size and resolution of the published reproduction should not exceed that appropriate to the analytic objective"); Documentary Filmmakers' Statement of Best Practices in Fair Use ("each quotation (however many may be employed to create an overall pattern of illustrations) is no longer than is necessary to achieve the intended effect"); Set of Principles in Fair Use for Journalism ("[t]he amount employed should be reasonably appropriate to the illustrative purpose"); Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing ("[m]edia scholars should only employ as much of the copyrighted work as necessary to illustrate the point or argument").

21. Code of Best Practices in Fair Use for Scholarly Research in Communication.

22. E.g., Code of Best Practices in Fair Use for Open CourseWare ("[c]opyrighted material that serves primarily to add entertainment value to the course should be avoided, as should merely duplicative illustrations that do not add materially to students' understanding"); Code of Best Practices in Fair Use for Poetry (critics, commentators, and artists "should also have an articulable rationale for the relevance of their chosen quotations to their own work" and "[u]ses that are solely 'decorative' or 'entertaining' should be avoided"); Code of Best Practices in Fair Use for Scholarly Research in Communication ("merely decorative or entertaining uses of copyrighted material, under the guise of illustration, are inappropriate"); Code of Best Practices in Fair Use for the Visual Arts ("[t]he writer's use of the work, whether in part or in whole, should be justified by the analytic objective, and the user should be prepared to articulate that justification" and the "analytic objective should predominate over that of merely representing the work or works used"); Set of Principles in Fair Use for Journalism ("[t]he illustration should add meaningfully to the audience's understanding of the facts or issues"); Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing ("[i]t should be clear in the body of the text or the caption why this work has been chosen").

23. E.g., Code of Best Practices in Fair Use for Online Video ("[p]roperly attributing material, whether in the body of the text, in credits, or in associated material will often reduce the likelihood of complaints or legal action and may bolster a maker's fair use claim"); Code of Best Practices in Fair Use for Open CourseWare ("[w]here possible with reasonable effort, the source of the illustration should be attributed"); Code of Best Practices in Fair Use for Poetry ("[c]ritics, commentators, and artists should provide conventional attribution for

their chosen quotations"); Code of Best Practices in Fair Use for Scholarly Research in Communication ("[s]cholars should provide citations in a form and manner typically used in communication scholarship for the material used in any publication of shared results of the study"); Code of Best Practices in Fair Use for the Visual Arts ("[t]he writing should provide attribution of the original work as is customary in the field, to the extent possible"); Documentary Filmmakers' Statement of Best Practices in Fair Use ("documentarians will be best positioned to assert fair use claims if… the material is properly attributed"); Set of Principles in Fair Use for Journalism ("[t]he journalist should attribute the material in a reasonable manner").

24. *New Era Publications Int'l ApS v. Carol Publishing Group*, 904 F. 2d 152 (2d Cir. 1990).

25. *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).

26. *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

27. *Authors Guild v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015).

28. *AV Ex. Rel. Vanderhye v. iParadigms*, LLC, 562 F. 3d 630 (4th Cir. 2009).

29. Code of Best Practices in Fair Use for Academic and Research Libraries.

30. *Id.* Another limitation expressed in the Code of Best Practices in Fair Use for Academic and Research Libraries is that search access to database materials should be limited to portions appropriate to the non-consumptive research purpose.

31. For an excellent analysis of how courts have treated many of the issues raised in this section, as well as other considerations, see Donaldson, *supra* note 19 at 505–23.

32. *See* Matthew Sag, *Predicting Fair Use*, 73 Ohio State Law J. 47, 77 (2012).

33. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 585 n.18 (1994).

34. 17 U.S.C. §107.

35. For more information on fair use and orphan works, see Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and other Memory Institutions, http://cmsimpact.org/code/statement-best-practices-fair-use-collections-containing-orphan-works-libraries-archives-memory-institutions/; Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 Berkeley Tech L.J. 1379 (2012).

36. While similar, copyright infringement and plagiarism are different transgressions. Copyright infringement is when one or more of the copyright holder's exclusive rights are infringed (such as the right to reproduce a work). Plagiarism is when someone takes an author's work and presents it as her own.

37. Transfers of *exclusive* rights are not valid unless they are in writing and signed by the copyright owner who is conveying the rights.

38. *See* Creative Commons, *Licensing Types*, https://creativecommons.org/share-your-work/licensing-types-examples/ (last visited Apr. 25, 2017).

39. *See, e.g., Photoservices*, Rijksmuseum, http://www.rijksmuseum.nl/en/photoservice; Rights and Reproductions, Yale University Art Gallery, http://artgallery.yale.edu/using-images; Image and Data Resources, Metropolitan Museum of Art, http://www.metmuseum.org/about-the-met/policies-and-documents/image-resources.

40. For more information about open licensing, see the *Authors Alliance* guide to *Understanding Open Access: When, Why, & How to Make Your Work Openly Accessible* at https://www.authorsalliance.org/resources/open-access-portal/.

41. Menesha A. Mannapperuma, Brianna L. Schofield, Andrea K. Yankovsky, Lila Bailey & Jennifer M. Urban, *Is it in the Public Domain?*, (May 27, 2014), available at https://www.law.berkeley.edu/files/FINAL_PublicDomain_Handbook_FINAL(1).pdf.

42. Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, http://copyright.cornell.edu/resources/publicdomain.cfm.

43. 17 U.S.C. §105. A "work of the United States government" is a work prepared by an officer or employee of the United States government as a part of that person's official duties.

44. *See* Creative Commons, CC0 *"No Rights Reserved"*, https://creativecommons.org/share-your-work/public-domain/cc0/ (last visited Apr. 25, 2017).

45. For more details about these statements and how they are developed, see http://cmsimpact.org/codes-of-best-practices/.

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